IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5488 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

R K INDUSTRIES

Versus

STATE OF GUJARAT

Appearance:

MR JR NANAVATI for Petitioner

MRS SIDDHI TALATI for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 03/09/97

ORAL JUDGEMENT

1. The petitioner a registered partnership firm having its industry at Sihor, filed this special civil application and prayed for the declaration that it is entitled to get the cash incentive and Sales Tax incentive benefit as per the resolution of Industries, Mines and Power Department, Government of Gujarat, Sachivalaya, Gandhinagar dated 27th August, 1980 and other resolutions and to direct the respondents,

particularly, the respondent No.3 to grant the Sales Tax deferment incentive benefit to the petitioner firm by issuing the necessary eligibility certificate and to further direct the respondents, particularly the respondent No.4, to refund the amount of Sales Tax so far recovered illegally from the petitioner.

2. The respondent No.3 is the General Manager, District Industries Centre, an officer of the Industries Department of the Government of Gujarat, and the respondent No.4 is the Commissioner of Sales Tax of the Government of Gujarat.

3. The facts of the case, in brief are that the Government has introduced a package of incentives for promotion of industries in rural and backward areas to achieve a more balanced growth and avoid further decongestion of developed areas and large cities effective from 1st November, 1977 vide Government resolution No.IOPD-No.MSC-1076-76237(I) J- dated 22-12-1977. This package of incentives consist of (i) cash on fixed capital investment, and (ii) sales tax benefit in terms of either exemption from sales tax or interest free sales tax loan. With a view to accelerate the development of industries and strengthen the trend of industries coming to developing areas, the State Government has decided to introduce a new scheme of sales tax benefits in lieu of the present sales tax exemption/loan scheme vide its resolution dated 27th August, 1980 and this scheme was given effect from 1st June, 1980. Under this resolution, the cash subsidy scheme of the earlier package was retained.

4. Clause (3) of this resolution provides for the applicability and eligibility of the industrial projects. New industrial project including expansion/ diversification by existing units commissioned (i.e. which have started commercial production) on or after 1-6-1980 shall be eligible to opt for sales tax benefits under the scheme in lieu of old sales tax incentive scheme.

5. The sales tax incentives have been provided under clause (6) of this resolution. The industrial units eligible as per clauses (2) and (3) of the resolution will have an option to chose one of the following two sales tax incentives:

(i) Sales tax exemption incentive:
(ii)Sales tax deferment incentive.

The details and modalities of those schemes have been given under the said clause. A copy of this resolution has been produced by the petitioner, enclosed to this special civil application as annexure `A'. The petitioner firm had set-up its new industry at Sihor, which is a `B' category industry and which has been declared as a backward area by the State Government. The petitioner stated that it has preferred the backward area for setting up its industry only with a view to get incentive benefits which are jointly given as cash subsidy benefit and sales tax deferment benefit. The industry set-up by the petitioner was in the banned list upto September, 1983 and the petitioner firm was granted licence to establish a factory for the manufacture of Angles and `Z' Section, which items are made from steel scraps only. The petitioner got itself registered as a Small Scale Industry Unit and firstly obtained S.S.I. provisional registration on 29th September, 1983 and thereafter had obtained land in the Industrial Area at Sihor from G.I.D.C., which allotted plot NO.203/205 in the month of September, 1983. The petitioner started production on 29th November, 1984. The petitioner applied on 25th June, 1985 to the third respondent to get the eligibility certificate for getting the sales tax deferment benefit as per the resolution of the Government dated 27th August, 1980. The petitioner stated that the office of the respondent No.3 has not given any reply even though the petitioner's industry was not in the list of ineligible industries for sales tax incentive. Then the petitioner stated that the benefit is refused on total non-application of mind and on considerations not germane to the policy consistently offered to such industries right from 1980. Though the petitioner has referred to have produced a copy of he resolution of January, 1982 of the respondent, however this resolution has been produced along with the reply by the respondents.

6. Under the resolution No.INC-1081-3308-N, Sachivalaya, Gandhinagar dated 7th January, 1982, the Government has after reviewing the position has prepared a comprehensive list of industries which will not be eligible for any incentives contained in the Government resolution dated 27th August, 1980. Annexure `I' enclosed to this resolution is a list of industries which were declared to be ineligible for getting any incentives and in serial No.24 thereof, the name of industry is, `re-rolling of steel including stainless steel'.

7. In reply to the special civil application, the respondent has stated that the application of the

petitioner for grant of eligibility certificate for getting the sales tax deferment benefit has been rejected by the respondent No.3 and the petitioner was informed about the same on 6th February, 1985. This benefit has been declined to the petitioner on the ground that the industry which it had set-up in the are is an ineligible industry.

8. This order of the respondent No.3 declining to extend the benefit of the resolution dated 27th August, 1980 to the petitioner's industrial unit has not been specifically challenged. The petitioner has tried to make an attempt in the special civil application to give out as if the respondent No.3 has not taken any decision on its application for grant of eligibility certificate of sales tax deferment scheme.

9. The respondent has further filed affidavit in this special civil application and thereunder has given out that for the sake of argument without admitting the claim of the petitioner even if it is assumed that the scheme would have been applicable to the case of the petitioner then too it would have been entitled for deferment of sales tax to the extent of Rs.4,08,997/-. As per the statement enclosed to this affidavit a sum of Rs.1,47,73,212/- (inclusive of Rs.68,18,706/- by way of interest) is due and recoverable under the Gujarat Sales Tax Act, 1969, and a sum of Rs,39,06,267/- (inclusive of Rs.22,29,286/- by way of interest) is due and recoverable under the Central Sales Tax Act, 1956. The statement made in the affidavit reflects the position as on 31st July, 1997.

10. The learned counsel for the petitioner contended that the respondents No.3 and 4 have proceeded against the petitioner under a wrong conception of the facts and law. The petitioner-unit was taken to be an industry engaged in re-rolling of steel including stainless steel, which is not correct. The petitioner-industrial unit is not an industry engaged in re-rolling of steel including stainless steel and it is an industry eligible for the benefits as extended to the industrial set-ups in the area under the resolution dated 27th August, 1980. Lastly, the counsel for the petitioner contended that under the resolution dated 6th May, 1986, entry 24 of Schedule A of the resolution dated 7th January, 1982 has been taken away and as such even the industry engaged in re-rolling of steel including stainless steel is eligible for the incentives. So this resolution has made a hostile discrimination.

11. On the other hand, the counsel for the respondents contended that the petitioner was not eligible for the benefits as extended to the industrial set-ups in the area vide resolution dated 27th August, 1980 as under the resolution dated 7th January, 1982, those benefits are not available to an industry engaged in re-rolling of steel including stainless steel. The petitioner is engaged in re-rolling of steel including stainless steel, and as such, rightly the respondent No.3 has decided not to give any benefits to it for the aforesaid resolution. It has next been contended that the petitioner has not challenged the validity of the resolution dated 7th January, 1982. It has next been contended that the resolution dated 6th May, 1986 has not made any hostile discrimination, as contended. The incentives in the nature of cash subsidy or sales tax exemption or deferment in sales tax are the concessions which are being given by the Government and no right could have been accrued to any of the persons. Lastly, the counsel for the respondents contended that otherwise also, without admitting the position, the petitioner would have been entitled for the benefit in deferment of the sales tax for the period which already expired long back.

12. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

13. The sales tax incentives are for backward areas as per the Government resolution dated 27th August, 1980 amended from time to time and the industrial units engaged in re-rolling of steel including stainless steel falls under entry 24 of Schedule A of subsequent resolution dated 7th January, 1982, being a banned industry is not entitled for the benefits of the incentives as provided in the resolution dated 27th August, 1980. The sales tax deferment scheme provides that the recovery of sales tax payable by the unit on sale of its production will be recovered in six annual installments by the sales tax department after 12 years of the respective due dates. No interest will be charged on amount so deferred. The industrial unit eligible for sales tax incentive under the resolution dated 27th August, 1980 would be required to convey its option between sales tax exemption incentive and sale tax deferment incentive in writing to the concerned District Industries Centre in case of small units and to the Industries Commissioner if it is medium and large scale unit (i.e. other than small scale industry). The option has to be exercised in writing before availing of any sales tax incentive benefit. An option exercise shall be

final and not subject to any change. On receiving an option, the General Manager, District Industries Centre in the case of small scale industry will consider the matter regarding its eligibility of the benefit under the scheme and if it is satisfied that the unit is eligible for either of the scheme opted, will issue a certificate of eligibility to unable it to obtain the incentive of the sales tax as opted. In the case in hand, the petitioner opted for sales tax deferment scheme and it submitted an application to the General Manager, District Industries Centre, Vidhyanagar, Bhavnagar for grant of the eligibility certificate but the unit of the petitioner was found to be a unit falling under entry No.24 of Schedule A of the resolution dated 7th January, 1982. But the question whether the petitioner-unit is engaged in re-rolling of steel including stainless steel or not is a question of fact. The respondent No.3 is an authority, an expert authority, to decide that question and in case ultimately after taking into consideration the relevant material available on record it has formed the opinion that the petitioner-unit is a banned unit that decision does not call for interference of this Court sitting under Article 226 of the Constitution. The petitioner in the special civil application submitted that the petitioner is a rolling mill and uses only the steel scraps. It has further been stated that the words "steel" and "steel scraps" as well as the words "rolling" and "re-rolling" have different connotations. What the petitioner has emphasised that "steel" is a prime material while "steel scrap" means small detached pieces of something i.e. not useful worn out and broken articles. The petitioner submitted that the raw material for the petitioner-firm is only steel scrap obtained from local sources. That matter has been considered by the respondent No.3 and the petitioner unit has been taken to be a re-rolling mill and not rolling mill as the raw material used by the petitioner is re-rollable scrap. Common meaning of re-rolling as per the respondent No.3 is to re-roll the material which is once already rolled. It has further been stated that for re-rolling, normally used material like scrap or re-rolling steel etc. is being used for the purpose. Such material is normally obtained by breaking machineries, ships, channels, angles etc. which are once used and are useless for the purpose for which they were manufactured. Such scrap, rolled steel etc. are generally used by re-rolling mills. That what really the petitioner also admitted. Further reasons have been given by the respondent No.3 not to accept the claim of the petitioner. The petitioner has not filed any rejoinder to the reply filed by the respondent No.3 and as such the averments made therein

stand uncontroverted. The petitioner in its application for S.S.I. registration submitted to the respondent No.3 on 29th October, 1984 clearly mentioned therein that steel re-rolling as its manufacturing activity. The petitioner is producing MS round bars etc. from re-rolling scrap and as such it has been taken to be not eligible for sales tax incentives. The registration has been given to the petitioner for production of MS round bars and CTD bars. The petitioner has further mentioned in its S.S.I. registration application that it will use re-rollable iron scrap billets as raw material. From this petitioner's own statement it is clear that the petitioner has set-up a re-rolling mill where re-rolled steel in the form of scrap etc. is being used as a raw material. On the basis of the aforesaid material, the decision taken by the respondent No.3 not to issue eligibility certificate to the petitioner by taking it to be a banned industry under the resolution dated 7th January, 1982 cannot be said to be illegal or arbitrary or perverse, which calls for interference of this Court under Article 226 of the Constitution.

14. The next question raised by the learned counsel for the petitioner of discrimination is also devoid of any substance. In the resolution dated 27th August, 1980 it is clearly mentioned that the incentives are given under discretionary powers of the State Government and hence they do not create any claim to the petitioner, enforceable in the Court of Law. The Government has reserved the right to revise, to discontinue, to amend the scheme and also to review it from time to time and remove, amend or add any items from and to it. The petitioner unit, as stated earlier, commenced production of MS round bars and CTD bars from re-rollable scrap from 4th October, 1984. It is true that in the new scheme which became operative from 1st April, 1986 to 31st March, 1991, the Government has deleted the item "re-rolling of steel including stainless steel" from the banned list of incentive scheme but it has not created any discrimination. Under the resolution of the Government dated 6th May, 1986 only those industrial units which commences commercial production during the operative period of the scheme is entitled for the benefits. The operative period of the scheme is with effect from 1st April, 1986 till 31st March, 1991. The petitioner has started production much earlier to 1st April, 1986 and as such it was not entitled for the benefit under the resolution aforesaid nor it can be said to be a case of discrimination. In such matters, the Government has absolute powers of review, revision, modification, alteration of its scheme.

15. Otherwise also, the petitioner, as it transpires from the affidavit of the Sales Tax Department and averments made therein have not been controverted, is in a habit of not paying the sales tax. The total liability of the sales tax of the petitioner upto 31st July, 1997 is near about two crores. This Court has granted the interim relief against the aforesaid recovery of sales tax dues on condition that the partners of the petitioner firm shall give a written undertaking to this Court within a fortnight from the date of the order to the effect that in case they fail in this petition they will pay the amount claimed with 12% running interest or such higher interest as the Court may finally decide. So the option has been kept open to consider the matter at what rate of interest the dues of the sales tax should be recovered. On the question that in such matters after the petitioner fails in the petition what rate of interest has to be paid by him or it on dues of tax, there is a decision of the Apex Court in which it is observed that in such matters, normally the rate of interest should have been of 18% per annum. See Agricultural and Processed Food Products vs. Oswal Agro Furane reported in 1996(4) SCC 297. I consider it to be advantageous to make reference to para nos.49 and 50 of the aforesaid judgment of the Apex Court.

> 49. Neither in the writ petition nor in the application for stay, was there any prayer with regard to non-payment of excise duty by Oswal Agro. Even if the impugned clause (vi) in the amended licence, which made it obligatory for Oswal Agro to export its entire quantity of edible rice bran oil, had been quashed even then for the purposes of removing the oil from the bonded warehouse for sale in the domestic market, excise duty in any case was payable. Under no circumstances, was Oswal Agro entitled to any order, interim or final, which could have allowed it to clear the goods without payment of excise duty. The High Court clearly overlooked the statutory provisions of Sections 3 and 5-A of the Act and Oswal Agro got an unfair and undue advantage as a reason thereof. It is, therefore, not only liable to pay the amount of excise duty which was due and payable but it also has to pay interest thereon.
>
> 50. What is the rate of interest which should be paid on the amount of excise duty payable is the next question. In a case like the present, Oswal

> Agro has clearly gained an undue advantage by obtaining an order which it was not entitled to get in accordance with law. Oswal Agro which is a commercial organisation had approached the High Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India purportedly to get justice. In actual fact it sought and obtained interim orders which resulted in its not becoming liable to pay excise duty which, under no circumstances, could have been a matter of dispute. A litigant who obtains an incorrect order and does not pay the statutory dues should not be allowed to make any profit or gain from the infraction of law. The money which was legitimately due to the Government has been utilised by Oswal Agro in its business. Dealing with such cases which have financial implications involving business houses or companies it is the commercial principles which must be applied by the Court while ordering payment of interest. Had Oswal Agro , instead of using the government money, obtained the said amount of loan from a bank, it would have had to pay interest thereon at the bank rate then prevailing. A lending institution like a bank would normally have advanced money for the purposes of business at the bank rate which is fixed with periodical rest. In addition thereto, a bank would normally also obtain a collateral security so as to safeguard the loan advanced by it. Oswal Agro has, on the other hand, not paid the excise dues to the Government and the government money has presumably been used in its business. No collateral security has been furnished by them because none was ordered by the court. Under these circumstances, there is no reason as to why Oswal Agro should not be required to pay at least that rate of interest, and on such terms, as it would have to pay to a bank if that amount of money had been obtained by it on loan. Keeping this principle in mind, it would be just and proper that Oswal Agro be directed to pay, in addition to the excise duty payable, interest at the rate of 18% per annum.

16. It is a case where for all these years the respondent-Sales Tax Department could not have recovered the sales tax dues from the petitioner as this Court has given the interim relief in favour of the petitioner. The petitioner has taken the advantage of it for all these years and the sales tax amount now which is to be

paid to the department by it has been used by the petitioner and certainly it would have been used by the petitioner in its business.

17. In the result, this special civil application fails and the same is dismissed. Rule discharged. It is hereby directed that the petitioner shall pay 18% p.a. interest on sales tax dues. The petitioner is further directed to pay Rs.2000/- by way of costs of this petition to the respondents.

****

zgs/-